No. 9220

United States
COURT OF APPEALS
for the Ninth Circuit

MARTHA JORDAN,

Appellant,

vs.

STATES MARINE CORPORATION OF DELAWARE, a corporation,

Appellee.

APPELLEE'S ANSWERING BRIEF

Henry R. Rolph,
Francis L. Tetreault,
GRAHAM, JAMES & ROLPH,
310 Sansome Street,
San Francisco, California,

William F. White,
WHITE, SUTHERLAND & WHITE,
1100 Jackson Tower,
Portland, Oregon,

Attorneys for Appellee.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 4-58

SUBJECT INDEX

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES (Cont.)

TABLE OF AUTHORITIES (Cont.)

No. 9220

United States
COURT OF APPEALS
for the Ninth Circuit

MARTHA JORDAN,

Appellant,

vs.

STATES MARINE CORPORATION OF DELAWARE, a corporation,

Appellee.

ANSWERING BRIEF OF APPELLEE STATES MARINE CORPORATION OF DELAWARE

The Court below had jurisdiction. This Court has jurisdicition. The undisputed facts have been correctly stated by Appellant in her statement of the case.

This appeal presents the novel question of whether or not the Appellant-wife has a cause of action for damages against the Appellee-shipowner for loss of consortium arising out of the fact that the Appellee-shipowner negligently inflicted bodily injury upon her sea-

man-husband while employed in the service of Appellee's American merchant vessel on the high seas.

It is conceded that within the State of Oregon by reason of a 1941 amendment to the Oregon's Married Woman's Act, ORS 108.010, a wife has a cause of action for loss of consortium against a person in Oregon negligently injuring her husband to the same extent that the common law had previously accorded a husband such an action for the negligent injury of his wife. ORS 108.-010 created the Appellee-wife's cause of action and did not merely remove an impediment to her bringing it. *Ellis v. Fallert* (1957), 209 Or. 406, 307 P.2d 283; *Sheard v. Oregon Electric Ry. Co.* (1931), 137 Or. 341, 2 P.2d 916.

ORS 108.010 reads:

> "All laws which impose or recognize civil disabilities upon a wife which are not imposed or recognized as existing as to the husband hereby are repealed; and all civil rights belonging to the husband not conferred upon the wife prior to June 14, 1941, or which she does not have at common law, hereby are conferred upon her, including, among other rights, the right of action for loss of consortium of her husband."

The United States District Court for the District of Oregon correctly entered summary judgment in favor of the Appellee-shipowner because:

1. If any tort was committed by the Appellee-shipowner it was a maritime tort in that the "place of wrong" was on the high seas; not in the Appellant-wife's home in Portland, Oregon.

2. Extra-territorial effect cannot be given to ORS 108.010 so as to impose liability upon a citizen of Delaware operating an American merchant vessel on the high seas.

3. To allow the Oregon created action of the Appellant-wife against Appellee-shipowner would work a material prejudice to the characteristic features of both the general maritime law and the Jones Act and interfere with the proper harmony and uniformity of that law at its interstate and international level contrary to the *Jensen* doctrine.

4. It is too late for Appellant-wife to contend that her action for loss of consortium merely supplements the general maritime law because Congress by enactment of the Jones Act and other legislation applicable to torts committted on the high seas has pre-empted the field.

5. The Appellant-wife having voluntarily surrendered her substantial right to consortium by tacitly permitting her husband to follow the sea has barred herself from right to sue for a loss she previously relinquished.

If any tort was committed by the Appellee-shipowner it was a maritime tort with "place of wrong" on the high seas; not in the Portland, Oregon home of the Appellant-wife.

The first critical question on this appeal is where the operative facts place the wrong. Did the tort occur on the high seas where allegedly the Appellee-shipowner negligently inflicted bodily injury upon the seaman-husband? Or, did the tort occur in the home of Appel-

lant-wife in Portland, Oregon where,as a consequence of her seaman-husband having been bodily injured on the high seas, she subsequently felt the loss of his alleged services, companionship, society and sexual intercourse? Otherwise put: Is a maritime or non-maritime tort herein involved?

Identically in point with the case at bar is *Westerberg v. Tide Water Associated Oil Co.* (1953), 110 N.E. 2d 395, 1953 AMC 553, where, as here, the wife of a seaman sued a shipowner for loss of consortium of her seaman-husband due to injuries which he received while employed at sea upon the shipowner's vessel. Both the Appellate Division of the Supreme Court of New York without opinion (107 N.Y.S. 2d 1004) and the Court of Appeals of New York with opinion (110 N.E. 2d 395) found without hesitation that a maritime tort was involved and dismissed the wife's complaint; the highest Court of the State of New York saying:

> "PER CURIAM:
>
> Judgment affirmed, without costs. The breach of duty by the defendant, which allegedly caused injuries to plaintiff's husband—injuries giving rise to her present action—occurred while the defendant's vessel was at sea and while he, as a seaman, was employed at service on that vessel. That alleged breach of duty by the defendant was a maritime tort. As such it cannot serve as a basis for plaintiff's complaint which demands relief of a character not within the purview of the 1920 amendment of the Merchants Marine Act ("Jones Act") 41 Stat. 1007, 46 U.S. Code Sec. 688. Upon that subject the United States Supreme Court has had occasion to state 'This Court has specifically held that the Jones Act is to have a uniform application throughout the

> country, unaffected by 'local views of common law rules.' *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 244. We pass upon no other question. Judgment affirmed, without costs. All concur."

Since then the Court in *Tate v. C. G. Willis, Inc.* (D. Ct. E.D., Va., 1957), 154 F. Supp. 402, likewise held that the domiciliary administratrix had no action against a shipowner for loss of her seaman-husband's consortium when negligently killed aboard a vessel by reason of the Court dismissing without comment libelant's second cause of action alleging loss of consortium.

However, let us consider on principle the operative facts in the case at bar to determine if it is sound for this Court to reach the same conclusion as did the above-mentioned Courts. Although the "high seas" do not constitute a state, a good point of departure in an analysis of the operative facts is the Restatement, Conflict of Laws, Section 377, which reads:

> "The place of the wrong is in the State where the last event necessary to make an actor liable for an alleged tort takes place."

It is to be noted that when the American Institute of Law sought to define the "place of wrong" for a tort it carefully measured its language and for good reason chose the words "the last event necessary" rather than general expressions such as "where the damage was done" or "where the harm ensued." Courts which have employed the last mentioned terminology have done so in the "physical impact" cases where the place of damage coincided with the place where the last event necessary to render the actor liable also occurred. In this

"non-physical impact" case the place of damage is conceivably different than the place of the last necessary event; making critically operative the carefully chosen wording of Section 377 of the Restatement.

The closest analogy of which we can think to the Appellant-wife's action for loss of consortium arising out of the negligent injury of her seaman-husband is that of her right of action for wrongful death had he been negligently killed at sea instead of injured. Comparatively, the consequences which the Appellant-wife would suffer in the one case is much the same, if not identical, as in the other. In both cases the last event necessary to render the actor liable is negligence on his part that directly inflicts either bodily injury or death upon the seaman-husband. Both injuries are conditioned upon the Appellee-shipowner negligently injuring or killing the seaman-husband. In both cases the consequential injuries suffered by the wife are of the "non-physical impact" variety—loss of services, society, companionship and even sexual intercourse. Both actions are conditioned exclusively upon infliction of harm upon the seaman-husband. Both actions are creatures of statute and foreign to both the maritime law and the common law.

There can be little question but that the "place of wrong," had the seaman-husband been killed instead of injured, would be either where the injury that caused death was inflicted or where the death occurred.

We invite the Court's attention to the Restatement, Conflict of Laws, Section 391 and Comment (a) there-

under; both pertaining to the right of action for death. They read:

> Sec. 391—Right of Action for Death
>
> "The law of the place of wrong governs the right of action for death."
>
> "Comment: (a) The place of wrong, as used in this Topic, means the *place of wrong to the decedent, not where pecuniary loss is caused to his relative.*" (Emphasis added).

The decisions fully support this view:

Confronted with determining the place of wrong in order to apply the correct wrongful death Act in *Hickman v. Taylor* (E.D., Pa., 1947), 75 F. Supp. 528, where a seaman on a tugboat was drowned in an interstate river due to the tugboat owner's negligence, Judge Kirkpatrick in determining the place of wrong to be upon the tug said:

> "The law of the place of wrong governs the right of action for death. 'The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place.' Restatement, Conflict of Laws, Sections 391 and 377, The 'last event' was the submerging of the forecastle, from which the drowning of Hickman resulted. *Rundell v. La Campagnie Generale Transatlantique,* 7 Cir., 100 F. 655."

The last operative act of the actor is not entirely disregarded in determining the "place of wrong" of a tort, even though point of death or point of injury is subsequently on land or in a different jurisdiction. For example, in *Minnie v. Port Huron Terminal Co.* (1935), 295 U.S. 647, 79 L. Ed. 1631, the Court determined that the death of a stevedore occurring when a

crane toppled him off of a vessel and onto a dock was maritime in character even though he didn't meet injury or death until he struck the "non-maritime" dock.

Likewise, in *The Ogontz* (2 Cir., 1927), 16 F.2d 948, 1927 AMC 308, the Court determined that the place of the wrong was aboard ship on the high seas where the seaman became ill because of eating poor food supplied by the shipowner, even though the seaman didn't die until he was put ashore on the Gold Coast of Africa which had no wrongful death Act.

In the non-maritime field the rule of "last necessary event" is the same. In *Banks v. King Features Syndicate* (SDNY, 1939), 30 F. Supp. 352, a woman sued for breach of her right to privacy; a tort having striking similarity to loss of consortium. The woman in Oklahoma had an x-ray taken showing a hemostat in her pelvic region. The doctor who took the x-ray gave it to the King Features Syndicate, without the woman's permission. King Features Syndicate, with an article referring to the woman by name, published it in newspapers throughout the United States including the New York Journal. The Court concluded that the place of the wrong was not where the Oklahoma woman suffered for the invasion of her privacy but the place where the seal of privacy was first broken.

In *Vrooman v. Beach Aircraft Co.* (10 Cir., 1950), 183 F.2d 479 which concerned an action involving breach of warranty the plaintiff of Missouri sued an aircraft manufacturer of Pennsylvania who last repaired the plaintiff's airplane in Kansas representing it fit to fly

when it wasn't. The crash of the airplane and resulting death of its occupants occurred in Indiana. The "place of wrong" was determined by the Court to be Kansas where the last necessary act occurred.

Counsel for the Appellant-wife perhaps would not have been confused by generalities expressed in cases or have contended that the place of wrong in the case at bar was in Portland, Oregon had he given heed to the astute observation made by Walter Wheeler Cook in his article, Tort Liability and the Conflict of Laws, 35 Col. L. Rev. 202, to which he invited this Court's attention. At page 208 the author said:

> "When confronted by these more complex situations in which the 'acts' in the sense defined by Mr. Justice Holmes, i.e., the movements of the actor's body, occur in one state, and the harm to the plaintiff occurs in another, courts and writers evade the difficulty and without adequate discussion assume that the applicable 'law' is that of the state in which the harm ensued but in which the actor did not act, and in which perhaps he has never been."

Both upon precedent and principle the Court below was correct in concluding that the undisputed operative facts established a maritime tort with the "place of wrong" on the high seas and thus entering summary judgment for the appellee-shipowner.

Extra-territorial effect cannot be given to ORS 108.010 so as to impose liability upon a citizen of Delaware operating an American merchant vessel on the high seas.

The Appellee-shipowner as a corporation of Delaware was a citizen of Delaware and was operating as shipowner the American merchant vessel COTTON STATE upon the high seas between California and the Far East. If a tortfeasor, it became such through negligence of its master or officers aboard the COTTON STATE or the unseaworthiness of its vessel on the high seas.

It is elementary that the liability for a tort committed on the high seas outside territorial waters of any state is determined by the law of the Nation whose flag the vessel flies.

Restatement, Torts, Section 406.

Where the vessel flies the American flag and where states and not nations are involved, the law of the state of domicile of the vessel or residence of her owner is equivalent to the law of the flag.

The Ogontz (2 Cir., 1927), 16 F.2d 948, 1927 AMC 308.

Hickman v. Taylor (DC, 1947), 75 F. Supp. 528, 533.

On occasion, the Courts have given extra-territorial effect to a state statute in order to allow recovery for a tort committed on the high seas where such state statute appears to be supplementary and not repugnant to the law maritime. However, in all such cases the Courts have applied the law of the state in which either the shipowner resided or the vessel was domiciled; *never the law of the state in which the plaintiff might reside.*

The Hamilton (1907), 207 U.S. 398, 52 L. Ed. 264.

The Ogontz, (2 Cir., 1927), 16 F.2d 948, 1927 AMC 308.

The E. B. Ward, Jr. (Cir. Ct., E.D. La., 1883), 17 Fed. 456.

Most recently, Judge Goodman in *Wilson v. Transocean Airlines* (D. Ct., Calif., 1954) 121 F. Supp. 85 at page 88, had occasion to discuss that which is required to give extra-territorial effect to a state statute on the high seas. He said:

> "Legislative jurisdiction to impose a liability for a wrongful act at sea beyond the boundaries of the state had to rest upon one of two theories; either (1) that the vessel upon which the wrongful act occurred was constructively part of the territory of the state; or (2) that the wrongdoer was a vessel or citizen of the state subject to its jurisdiction even when beyond its territorial limits. Neither theory sufficed for every situation."

See:

Robinson, 36 Col. L. R. 406 (1936).

Magruder and Grout, 35 Yale L. Journal 395 (1926).

Putnam, 22 Case and Comment 125 (1915).

Since the Appellant-wife in this case has a cause of action created and bottomed entirely upon the 1941 amendment of the Oregon Married Women's Act as codified in ORS 108.010 she cannot possibly employ the Oregon Act extra-territorially in order to support her cause of action against Appelle-shipowner for a maritime tort occurring upon the high seas somewhere between California and the Far East. ORS 108.010 by its

language does not attempt to extend its application beyond the boundaries of the State of Oregon. It is also well settled that the implied condition of all state legislation is that such is intended to be operative only within the jurisdiction of the legislative body so enacting it. *Armburg v. Boston & M. R. Co.,* (1931), 276 Mass. 418, 177 N.E. 665, 80 ALR 1408; *Southern Pacific Railroad Co. v. Gonzales* (Ariz., 1936), 61 P.2d 377, 106 ALR 1012.

Of course, if the Appellant-wife should now attempt to "shift her rudder," so to speak, and look to the law of Delaware for authority upon which to sue for loss of consortium she will find that the law of that state denies the wife a right to sue a person for loss of consortium due to the negligent injury of her husband. *Delaware Code,* Title 13, Sec. 311; *Sobolewske v. German* (1924), 32 Del. 540, 127 Atl. 49.

Thus, the impropriety of giving extra-territorial effect to ORS 108.010 in order to impose liability upon the Appellee-shipowner operating on the high seas was a further cogent reason for the Court below entering a summary judgment in favor of Appellee.

Appellant-wife's action encroaches upon the characteristics and uniformity of the maritime law and should not be permitted to be imposed upon a shipowner.

A tort on the high seas concerns not only the internal economy and discipline of the vessel but commerce between nations. Commerce on the high seas is even more exclusively within the national care than interstate commerce on land. *Pullman's Palace Car Co. v. Pennsylvania,* (1891) 141 U.S. 18, 35 L. Ed. 613. The Supreme Court of the United States, as supreme architect of American maritime law has sharply stated that state encroachment upon the maritime law which works material prejudice to its characteristic features or interferes with its uniformity at interstate and international levels will not be tolerated. *Southern Pacific Co. v. Jensen* (1917), 244 U.S. 206, 61 L. Ed. 1086. Although this so-called *Jensen* doctrine has since been qualified as to matters occurring in state territorial waters, *Standard Dredging Corp. v. Murphy* (1943), 319 U.S. 306, 87 L. Ed. 1416; or matters of procedural law, *Madruga v. Superior Court of San Diego County,* Calif. (1954), 346 U.S. 556, 98 L. Ed. 290; or matters of strictly local concern, *Wilburn Boat Co. v. Fireman's Fund Ins. Co.* (1955), 348 U.S. 310, 99 L. Ed. 337, it has never been questioned as being applicable with all its vigor in respect to matters occurring on the high seas or effecting vessels steaming between nations.

This unique action of the Appellant-wife created by an Oregon statute so far as it seeks to impose liability upon Appellee-shipowner for a wrong committed upon

its Delaware vessel on the high seas is an unwarranted encroachment upon an area of maritime law that has long been under exclusive national care. The action, if allowed, would set the wife upon a higher pedestal than her seaman-husband; would give her an action for negligence, which until the Jones Act, her seaman-husband never had. *The Osceola* (1903), 189 U.S. 158, 47 L. Ed. 760. Furthermore, with Appellant-wife's allegations in her complaint of the vessel being unseaworthy, she would not only be imposing a "liability without fault" upon the Appellee-shipowner where it owes to her no such duty but would also be giving her a new specie of fault upon which to ground her action beyond that given her in Oregon by the Oregon Act.

Perhaps, the only distinction between the effect upon the Appellee-shipowner of this action for loss of consortium and an action for the seaman-husband's wrongful death is that in the former action a new liability entirely foreign to maritime law is added to the shipowner's woes without deminution or elimination of his liability to the seaman-husband, while in the wrongful death action the personal injury liability, if it existed at all, would pass out of the picture in favor of the wrongful death liability. Thus, the novel idea of giving the wife of a seaman an action for loss of consortium adds a new and additional liability to the shipowner; not a substitute of one for another.

The maritime law in this generation has fashioned for the seaman the most liberal remedies in the world in the nature of maintenance and cure and Jones Act

causes of action in which he can take along with him to the jury his traditional claim that the vessel was unseaworthy. As a ward of the Admiralty Court the seaman can do no wrong. All of this has come about and has been justified only upon the ground that by the hazards of the sea and the peripatetic nature of his calling the seaman is primarily a poor and friendless soul. To now let his wife ride his coat-tail for another bite at the apple is repugnant to every concept of every law of the sea.

The Oregon Act, ORS 108.010 which gives the Appellant-wife her cause of action, if applied to shipowners operating on the high seas, would completely destroy the uniform application of the maritime law for the reason that all but a very few states in the Union deny a wife such a cause of action. This situation would make it impossible for the shipowner to determine the liability of his maritime venture as it would depend upon: (1) if his seamen were married, and (2) what state the wife might be residing at time an unforeseen injury was inflicted upon her seaman-husband while at sea.

It is too late for Appellant-wife to contend that her action for loss of consortium merely supplements maritime law because Congress has pre-empted the field of torts on the high seas.

Having shown in our discussion of the "place of the wrong" that Appellant-wife's action for loss of consortium is remarkably similar to an action for wrongful death, had her seaman-husband wrongfully met his death on the high seas, it becomes important to consider whether by the same analogy the Appellant-wife can successfully contend that her loss of consortium action like a wrongful death action is a permissible state encroachment because it is supplementary rather than repugnant to the maritime law.

It is true that prior to 1920 the Supreme Court of the United States permitted extra-territorial effect to be given to the wrongful death Act of the state wherein the shipowner resided in order to provide a remedy for wrongful death on the high seas. *The Hamilton* (1907), 207 U.S. 398, 28 S. Ct. 133. In those days, prior to Congress entering the field, neither the common law nor the maritime law allowed recovery for wrongful death. The Supreme Court which constitutionally has the ultimate power to fashion new admiralty law at that time very wisely permitted the extra-territorial application of state legislation to fill the void. However, since then, Congress has legislated so completely and unequivocally in respect to death and bodily injury upon the high seas that it must be presumed that it intended to pre-empt the field.

In 1920 by almost simultaneous action, Congress enacted the Jones Act (Merchant Marine Act of 1920) 41 Stat. 1007, 46 USCA 688 and the Death on the High Seas Act, 41 Stat. 537, 46 USCA 761-768. With the Jones Act Congress added to the seaman's action for unseaworthinessa right to sue the shipowner for personal injuries and death arising out of negligence. By the Death on the High Seas Act Congress gave the personal representative of every person wrongfully dying on the high seas a cause of action. As to personal injuries occurring to passengers aboard ship it left them their maritime or common law remedy but did in 1939 legislate to protect them from unreasonably short statutes of limitations and for stipulations exonerating the shipowner from his own negligence. 49 Stat. 960, 1480, 46 USCA 183 (b) and (c).

In 1935 Congress enacted the first substantial amendment to the Limitation of Liability Act since the 1880's, requiring a minimum limitation fund on claims for loss of life and bodily injury. 49 Stat. 960, 46 USCA 183, 185. We mention this series of legislative enactments to show how completely Congress has undertaken to legislate with respect to personal injuries or deaths occurring on the high seas. Presently, the only place a state wrongful death Act is applied to a maritime tort is where death occurs to a non-seaman within the territorial waters of a particular state. Since the Jones Act, no state wrongful death Acts can be applied to seamen wrongfully killed even in territorial waters of a state. *Lindgren v. United States* (1930) 281 U.S. 38, 74 L. Ed. 686.

It is our contention that with enactment of the Jones Act Congress has evidenced an intent to envelope the entire field of tort on the high seas and has pre-empted the field so far as torts connected with or conditioned upon injury to a seaman are involved. Congress has, in effect, told the world that when and if it deems it appropriate for the wife of a seaman-husband to have a cause of action against a shipowner for loss of consortium arising out of a personal injury to her seaman-husband on the high seas it will so enact such a law and until then states should not meddle in that which is exclusively the legislative concern of Congress.

The doctrine of Federal pre-emption of a legislative field is no new thing. If Congress has not filled up every little "chink" in the wall it is not for the state to do so on the theory that it is helping Congress in its exclusive concern. Mr. Justice Holmes in *Charleston & Western Carolina R. Co. v. Varnville Furniture Co.* (1915), 237 U.S. 597 59 L. Ed. 1137 said in respect to a state law that appeared to help interstate commerce (U.S. p. 604):

> "When Congress has taken the particular subject matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go."

The Supreme Court's most recent expression on the subject of Congressional pre-emption of a legislative field is found in the Smith Act case of *Pennsylvania v. Nelson* (1957), 350 U.S. 497, 100 L. Ed. 640.

More in point, however, to the Appellant-wife's

cause of action is the Supreme Court's view that the Jones Act is to be uniformly applied and remain uneffected by local views of common law. The Court said in *Garrett v. Moore-McCormack Co.* (1942), 317 U.S. 239, 87 L. Ed. 239 at U.S. page 244:

> "This Court has specifically held that the Jones Act is to have a uniform application throughout the country, uneffected by 'local views of common law' *Panama R. Co. v. Johnson,* 264 U.S. 375, 392. The Act is based upon, and incorporates by reference, the Federal Employers' Liability Act, which also requires uniform interpretation. *Second Employers Liability Cases,* 223 U.S. 1, 55 et seq."

It is not a sufficient answer to say that the Appellant-wife's cause of action is separate from her husband's cause of action and thus has nothing to do with the Jones Act because her action is conditioned upon the identical operative facts which give rise simultaneously to her seaman-husband's action under the Jones Act and affects the same shipowner. This certainly was the view of the Court of Appeals of New York in *Westerberg v. Tide Water Associated Oil Co.* (1953), 110 N.E. 2d 395, 1953 AMC 553 (opinion on pages 4 and 5 of this brief).

Appellant-wife by her conduct in permitting her husband to follow the sea has forsaken so much of her consortium that she is now barred from claiming damage for its loss.

An action by a wife for loss of her husband's consortium is apparently a new wrinkle in tort law. When one gives a wife a personal type of cause of action which only her husband previously had, and when one attempts to apply it to the law and activity of the sea to which it never belonged, some strange anomalies arise.

One thought that persists in our analysis of the Appellant-wife's unique action is how she can be entitled to recover damages from a shipowner for a loss of consortium with her seaman-husband when by her conduct in permitting her husband to follow the sea she has already relinquished substantially all consortium. This is particularly true in the case at bar, where the seaman-husband was already paid for the loss of services by receiving $14,000.00 which covered present and future wages as well as maintenance and cure. We cannot say that all loss of consortium was relinquished by the wife by reason of her husband following the sea, but that which might be left is so minimal as to question the wisdom of permitting an action of this type to be imposed in such a situation.

We find some support for our contention that the Appellant-wife's conduct in tacitly permitting her husband to follow the sea constitutes a bar to her action in the Restatement of Torts. Where a husband by con-

sent or by his conduct indicates a willingness that his wife's affections be alienated, his cause against another for alienation of his wife's affections is barred. Restatement, Torts, Section 687. A parent who consents to the intentional infliction of bodily harm upon his minor child is barred from recovery against another person. Restatement, Torts, Section 702.

CONCLUSION

This Court should affirm the summary judgment entered by the United States District Court for the District of Oregon in favor of Appellee for the reasons:

1. That the last necessary act to render Appellee-shipowner liable for the alleged tort occurred aboard Appellee's vessel at the time operating upon the high seas; making the tort, if any, committed by Appellee-shipowner a maritime tort governed by the Jones Act and general maritime law.

2. Extra-territorial effect cannot be given to Oregon's ORS 108.010 which created Appellant-wife's cause of action for loss of her husband's consortium so as to impose liability upon the Appellee-shipowner, a citizen of Delaware operating its vessel on the high seas.

3. To allow the Oregon created action of Appellant-wife against Appellee-shipowner for loss of consortium of her seaman-husband would work a material prejudice to the characteristic features of both the Jones Act and the general maritime law and interfere with the proper harmony and uniformity of that law at its inter-

state and international level contrary to the well established *Jensen* doctrine.

4. It is too late for Appellant-wife to contend that her action for loss of consortium merely supplements the general maritime law because Congress by enactment of the Jones Act and other legislation has preempted the field of torts occurring upon the high seas.

5. The Appellant-wife having voluntarily relinquished in substance any right to loss of her husband's consortium by tacitly permitting him to follow the sea has barred herself from the right to sue Appellee-shipowner for loss of consortium which she had already forsaken.

WHEREFORE, the Appellee prays that this Court affirm the judgment entered in its favor in the Court below.

Respectfully Submitted,

Henry R. Rolph,
Francis L. Tetreault,
GRAHAM, JAMES & ROLPH,
310 Sansome Street,
San Francisco, California.

William F. White,
WHITE, SUTHERLAND & WHITE,
1100 Jackson Tower,
Portland, Oregon.